



Proceedings of the 2019 Annual Conference

**October 24 and 25, 2019
Indianapolis, Indiana**

Great Lakes Academy of Legal Studies in Business

Table of Contents

I.	Conference Schedule	2
II.	Presentation Abstracts	4
III.	2019 Best Paper Awards	8
IV.	Papers Published in Proceedings	9
a.	<i>A New Day for Managing Corporations— What Business Students Need To Know</i> Catherine Jones-Ridders, Grand Valley State University James Sanford, Grand Valley State University	10
b.	<i>Let's (Not) Play: How YouTube's Use Rules Allow Copyright Owners to Curtail Legal Fair Use</i> Jessica A. Magaldi, Pace University Jonathan S. Sales, Bentley University Wade Davis, Minnesota State University, Mankato	16
c.	<i>The River of Law and the Engagement Ring</i> Nancy J. White, Central Michigan University	31

Great Lakes Academy of Legal Studies in Business

Conference Schedule

Chancellor 2 Room
Embassy Suites by Hilton Indianapolis Downtown

Thursday, October 24, 2019

Registration (Noon to 1 PM)

First Session (1 PM to 2:30 PM)

Jessica Magaldi, Pace University

Let's (Not) Play: How YouTube's Use Rules Allow Copyright Owners to Curtail Legal Fair Use

Joseph J. Galante, Millersville University of Pennsylvania

Examining Agency Principles and Its Applications in the Business Administration Curriculum

Snack Break (2:30 PM to 3 PM)

Second Session (3 PM to 4:30 PM)

Annette Redmon, University of Cincinnati, UC Blue Ash College

Patrick Redmon, Berkeley Research Group, LLC

Telemedicine, Medical Liability, and Patients' Access to Care

Suzanne Gradisher, The University of Akron

Getting to Know Your Clients Using Public Records

Complimentary Cocktail Reception (5:30 PM to 7:30 PM)

Friday, October 25, 2019

Complimentary Breakfast Buffet (6:30 AM to 8:30 AM)

First Session (8:30 AM to 10:00 AM)

Peter Prescott, Butler University
Analyzing the Academic Effects of College Internships

Nancy J. White, Central Michigan University
The River of Law and the Engagement Ring

(Beverage Only) Break (10:00 AM to 10:15 AM)

Second Session (10:15 AM to 12:00 PM)

Dan Ostas, University of Oklahoma
Ethics of Legal Astuteness: Barring Class Actions through Arbitration Clauses

Marc McAllister, Texas State University
Proving Sex-Plus Discrimination through Comparator Evidence

Catherine Jones-Ridders, Grand Valley State University
James Sanford, Grand Valley State University
A New Day for Managing Corporations—What Business Students Need To Know

Buffet Lunch (12:00 PM to 1:00 PM)

Third Session (1 PM to 2:45 PM)

Amy Hendrickson, Saginaw Valley State University
Profiting from Addiction: A Comprehensive Business Law Case Problem

Stacy Hickox, Michigan State University
Keenan Case, Michigan State University (student)
Assessing the Effective Strategies in Achieving Accommodations for People with Hidden Disabilities

Beau Lefler, University of Hong Kong
The Constitutionality of Corporate Voting

Snack Break (2:45 PM to 3:00 PM)

Business Meeting (3:00 PM to 4:00 PM)

Great Lakes Academy of Legal Studies in Business

Presentation Abstracts (Alphabetized by first presenter's last name)

Joseph J. Galante, Millersville University of Pennsylvania

Examining Agency Principles and Its Applications in the Business Administration Curriculum

This paper addresses and demonstrates how the law of agency governs the legal rights and duties that arise when one person acts on behalf of another. The smallest business owned by a single individual proprietor usually must hire employees, and even completely self-employed individuals conduct business with others through their agents. As businesses grows in size and adopt a formal structure, agency becomes increasingly important.

Specifically, the use of judicial case decisions will show how agency relationships enable employers to conduct business activities and the subsequent consequences of not knowing, understanding, and applying correct agency principles to those activities.

Examining agency principles allows students to appreciate the interrelationships found in various business disciplines with underlying business law and legal principles. Agent-principal relationships have a wide impact across business disciplines such as accounting, finance, marketing, and, management. Key areas include employee-independent contractor status, workers' compensation, and disclosure issues in agent-third party transactions.

Suzanne Gradisher, The University of Akron

Getting to Know Your Clients Using Public Records

All professions have clients and there are plenty of articles that give advice to professionals on how to better get to know their clients. I have looked at many of these articles and have yet found one that used public records to discover information about their clients. I want to discuss with the group if they think the use of public records is an appropriate or inappropriate means to do this. When I am speaking of public records I mean for example: 1. County GIS systems to look up deeds (determine how it is owned), mortgages, taxes; 2. State Uniform Commercial Code filings (determine debt and creditor positions); 3. State Secretary Office to look up business ownerships; and 4. Multijurisdictional court cases searches. Are there others that I am missing?

Amy Hendrickson, Saginaw Valley State University

Profiting from Addiction: A Comprehensive Business Law Case Problem

According to the National Institute of Health (NIH), in 2011 there were 137 prescriptions for opioids for every 100 people in the state of Kentucky. By 2017, the rate had declined to 87 prescriptions per 100 people, far surpassing the troubling national average of 59 per 100 people. The NIH estimates that the cost of prescription opioid abuse is more than \$78 billion per year due to crime, lost work productivity, and health care. Overdose deaths due to prescription opioids are occurring at a rate of approximately 139 people per day. This public health disaster is not the work of violent drug cartels but rather seemingly legitimate businesses who have profited from this growing business. Given the massive tort liability,

regulatory failure, and ethical issues, the opioid crisis provides an opportunity to engage students in a multi-faceted exploration of business law.

Stacy Hickox, Michigan State University

Keenan Case, Michigan State University (student)

Assessing the Effective Strategies in Achieving Accommodations for People with Hidden Disabilities

Employees and applicants with hidden disabilities may require accommodations to perform the duties of a position or to avoid posing a threat in the workplace. Neither this need nor their disability may be readily apparent to an employer so people with hidden disabilities must decide whether to reveal their disability to enable them to access reasonable accommodations available to them under the Americans with Disabilities Act (ADA). Revelation carries the real or at least the perceived risk of a negative reaction from both supervisors and coworkers, because of the stigma and stereotypes attached to these disabilities. Given this conundrum, this article explores the process of informing an employer that an accommodation is needed because of an employee's disability. Employees at Michigan State University were surveyed about the process they encountered to obtain accommodations on campus, and whether those processes effectively protected them against stigmatization by their supervisors and coworkers. Effective strategies for employers to prevent such stigmatization will be explored in light of social science research on both the need for accommodations and the potential for stigmatization, as well as examples of current employer policies and practices related to the accommodation process.

Catherine Jones-Ridders, Grand Valley State University

James Sanford, Grand Valley State University

A New Day for Managing Corporations—What Business Students Need To Know

On August 19, 2019, chief executives from the Business Roundtable offered a new definition of the purpose of a corporation. No longer was the primary job of the corporation to advance only the interest of the shareholders but to take into account all stakeholders, such as employees, customers, and the society at large. This statement is a major philosophical shift in how the corporation should be managed. This paper will discuss the history leading to this change and why this is important for business students to understand in studying corporations.

Beau Lefler, University of Hong Kong

The Constitutionality of Corporate Voting

Hong Kong is unique in perhaps the entire world in its granting corporate entities (domestic and foreign) the right to vote in elections for the main legislative body. This condition is the product of the style of colonial rule under the British, and of their belated attempt to move the colony towards democracy before the handover to China in 1997. In 2009, a judicial review lawsuit was filed against the Secretary for Justice (equivalent to the Attorney General in the United States) asking that the court rule that corporations cannot vote as a matter of constitutional law. I use this case to teach about the nature of a natural person vs. a corporate entity, the structure of Hong Kong government, and how laws are made. I also use it to bring context and a wider perspective to the protests that are currently rocking the city and affecting students.

Jessica Magaldi, Pace University

Let's (Not) Play: How YouTube's Use Rules Allow Copyright Owners to Curtail Legal Fair Use

The creation of YouTube in 2005 and the subsequent development of Let's Play videos transformed the way video game players experienced video games. Instead of simply playing video games, the Let's Play phenomenon gave players the ability to record and upload livestream videos of themselves playing their favorite games, providing commentary and tips, and entertaining their viewers. This Article examines what happens when a cutting-edge online trend redefining how video game players experience gaming runs head-on into the copyright interests of one of the largest video game producers, through an analysis of Nintendo's response to Let's Play videos. We examine Nintendo's Legend of Zelda games, including Twilight Princess, to determine the potential copyright violations of Let's Play videos, and to try to understand the strategic business decisions Nintendo contended with in determining how to respond in a manner that balances its copyright interests with Let's Play creators and Nintendo's customers.

Marc McAllister, Texas State University

Proving Sex-Plus Discrimination through Comparator Evidence

Sex-plus discrimination occurs when an employer discriminates against a particular subgroup of males or females, such as women with children, based on both the plaintiff's sex (e.g., female) and a "plus" factor (e.g., having children). Sex-plus plaintiffs often attempt to prove their claims with one of two types of comparator evidence. The first type, referred to as "opposite sex comparator evidence," compares an employer's treatment of the plaintiff against persons of the opposite sex as the plaintiff who share the same plus characteristic. The second type is "same sex comparator evidence," which instead shows how the employer treats persons of the same sex as the plaintiff who lack the plus characteristic at issue. This presentation considers whether a sex-plus claim necessarily fails in the absence of opposite sex comparator evidence, as some courts have held; and whether same sex comparator evidence has any evidentiary value in sex-plus claims.

Dan Ostas, University of Oklahoma

Ethics of Legal Astuteness: Barring Class Actions through Arbitration Clauses

Recent Supreme Court cases empower firms to effectively bar class action lawsuits through mandatory arbitration clauses included in consumer adhesion and employment contracts. This article reviews these legal changes and argues for economic self-restraint among both corporate executives and corporate lawyers who advise them. Arbitration has many virtues as it promises to reduce transaction costs and to streamline economic exchange. Yet, the ethics of implementing a legal strategy *often* requires self-restraint when one is in a position of power, and *always* requires respect for due process when issues of human health, safety, and dignity are in play. This article closes by articulating and defending a voluntary minimum moral framework for use of the arbitration process in consumer and employment settings.

Peter Prescott, Butler University
Analyzing the Academic Effects of College Internships

Universities and students increasingly view internships as valuable learning experiences that complement and augment academic classroom learning. Students benefit from the opportunity to apply recently acquired knowledge in the “real world,” to identify knowledge gaps that they should address in future coursework, and to secure a post-graduation job. But, benefits beget costs because nothing is free in life—including internships. Our econometric analysis employs two modeling techniques to measure the academic effects students experience when they complete a mandatory internship while concurrently taking academic courses. After controlling for a number of student- and curriculum-related factors, we find that students’ academic performance was negatively affected by the internship while it was ongoing. Although academic performance did rebound after the students completed their internships, it did not fully recover. Our findings suggest that faculty and administrators cannot determine the appropriate curricular role for college internships without fully considering their academic effects.

Annette Redmon, University of Cincinnati, UC Blue Ash College
Patrick Redmon, Berkeley Research Group, LLC
Telemedicine, Medical Liability, and Patients’ Access to Care

Researchers and policymakers have begun to advocate for the use of telemedicine as a means of reaching underserved populations. While more organizations have shown a willingness to use these technologies to serve patients, the legal implications of these technologies are not fully clear with respect to liability for providers. Legal issues include, but are not limited to, patient privacy concerns and informed consent and legal liability, jurisdictional and regulatory issues for any cross-state medical practice. This presentation will review the current state of telemedicine use in the US and the legal considerations and implications for health care providers, including licensure requirements along with existing and potential issues related to interacting with patients remotely. The paper will review the policy implications of telemedicine liability issues and suggest potential solutions to encourage the expansion of access to care for consumers through telemedicine services when economically efficient and clinically justified.

Nancy J. White, Central Michigan University
The River of Law and the Engagement Ring

Presents a short lecture, a reading, and an in-class exercise designed to efficiently teach students how case law is made in a typical court system. The content is based on an analogy to a river. Cases go upstream in the river of case law, starting from the trial court, moving to the appeal court, and finally to a supreme court. Law, as compared to cases, flows downriver in the river of case law. That is, law from an appeal court is put into the river of law but flows downriver (is precedent for) only to the courts below that appeal court. Law from a supreme court is put into the river at the headwater and flows down into all of the courts in the system and is therefore precedent for all of the courts in the system.

Great Lakes Academy of Legal Studies in Business

Best Paper Awards

2019 Best Paper Award

Colleen M. Baker, University of Oklahoma

Daniel T. Ostas, University of Oklahoma

Ethics of Legal Astuteness: Barring Class Actions through Arbitration Clauses

Abstract

Recent Supreme Court cases empower firms to effectively bar class action lawsuits through mandatory arbitration clauses included in consumer adhesion and employment contracts. This article reviews these legal changes and argues for economic self-restraint among both corporate executives and corporate lawyers who advise them. Arbitration has many virtues as it promises to reduce transaction costs and to streamline economic exchange. Yet, the ethics of implementing a legal strategy *often* requires self-restraint when one is in a position of power, and *always* requires respect for due process when issues of human health, safety, and dignity are in play. This article closes by articulating and defending a voluntary minimum moral framework for use of the arbitration process in consumer and employment settings.

2019 Best Paper Runner-Up Award

Jessica A. Magaldi, Pace University

Jonathan S. Sales, Bentley University

Wade Davis, Minnesota State University, Mankato

Let's (Not) Play: How YouTube's Use Rules Allow Copyright Owners to Curtail Legal Fair Use

Abstract

The creation of YouTube in 2005 and the subsequent development of Let's Play videos transformed the way video game players experienced video games. Instead of simply playing video games, the Let's Play phenomenon gave players the ability to record and upload livestream videos of themselves playing their favorite games, providing commentary and tips, and entertaining their viewers. This Article examines what happens when a cutting-edge online trend redefining how video game players experience gaming runs head-on into the copyright interests of one of the largest video game producers, through an analysis of Nintendo's response to Let's Play videos. We examine Nintendo's Legend of Zelda games, including Twilight Princess, to determine the potential copyright violations of Let's Play videos, and to try to understand the strategic business decisions Nintendo contended with in determining how to respond in a manner that balances its copyright interests with Let's Play creators and Nintendo's customers.

Great Lakes Academy of Legal Studies in Business

Papers Published in the Proceedings

<i>A New Day for Managing Corporations—What Business Students Need To Know</i>	10
Catherine Jones-Ridders, Grand Valley State University James Sanford, Grand Valley State University	
<i>Let's (Not) Play:</i>	16
<i>How YouTube's Use Rules Allow Copyright Owners to Curtail Legal Fair Use</i>	
Jessica A. Magaldi, Pace University Jonathan S. Sales, Bentley University Wade Davis, Minnesota State University, Mankato	
<i>The River of Law and the Engagement Ring</i>	31
Nancy J. White, Central Michigan University	

**A NEW DAY FOR MANAGING CORPORATIONS –
WHAT BUSINESS STUDENTS NEED TO KNOW**

by

Catherine G. Jones-Rikkens¹

and

James Sanford²

Abstract

On August 19, 2019, chief executives from the Business Roundtable offered a new definition of the purpose of a corporation. No longer was the primary job of the corporation to advance only the interest of the shareholders via profit maximization. The new definition requires that the firm take into account all stakeholders, such as employees, customers, and society at large. This statement is a major philosophical shift in how the corporation should be managed. This paper will discuss the history leading to this change and why this is an important concept for business students to understand.

History

For over 80 years, the chief paradigm governing the purpose of corporate operations focused on profit maximization as the primary goal. In an academic treatise published in 1932 entitled, “The Modern Corporation and Private Property,” Adolf Berle, Jr. and Gardiner Means wrote, “You cannot abandon emphasis on the view that business corporations exist for the sole purpose of making profits for their shareholders until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else.”³

¹ Associate Professor of Business Law, Grand Valley State University Seidman College of Business
Allendale, Michigan

² Professor of Business Law Grand Valley State University Seidman College of Business
Grand Rapids, Michigan

³ Luigi Zingales, (2019), <http://www.washingtonpost.com/opinions/2019/08/20/dont-trust-ceos-who-say-they-cont-care-about-shareholder-value-anymore/> (last visited Sep 10, 2019).

In 1970, Milton Friedman's article, "The Social Responsibility of Business is to Increase Profits," set the standard of profit maximization that has long been followed.⁴ Friedman, an economist at the University of Chicago, preached the gospel of profits-as-purpose and derided anyone who thought businesses should exist for any other purpose.⁵ It should be noted that Friedman was recognized with the Nobel Prize in Economics in 1976 due, in part, to his 1962 book entitled, *Capitalism and Freedom*.⁶

Because of Friedman's prestige and influence, business students were taught that the purpose of business was to maximize profits. "Businesses are not organized to engage in social activities: they are structured to produce goods and services for which they receive money. Their social obligation is to return as much of this money to their direct stakeholders as possible. In a free market with significant competition, the selfish pursuits of corporations will lead to maximizing output, minimizing costs, and establishing fair prices. All other concerns distract companies and interfere with achieving these goals."⁷ Business professors taught that companies that did not strive to maximize profits would be forced out of the marketplace by more efficient competitors. According to this approach, profit maximization was the key measure of the well-run company.⁸

The concept of "selfish pursuits" discussed by Friedman most likely originated with the work of the famous economist, Adam Smith. Smith wrote the book, *The Wealth of Nations*, and discussed the concept of the "invisible hand." According to Smith, individuals best benefit society by pursuing their own selfish interests.⁹

In the 1980s and 1990s the "shareholder primacy" concept was the rage with the emphasis on maximizing shareholder value. This concept supplemented the profit maximization approach by

⁴ David Benoit, The 'Stakeholder' CEOs Main- WSJ20190820.pdf – Top CEOs See a Duty Beyond Shareholders BY DAVID BENOIT The new statement of purpose was endorsed by Coursehero.com (2019), <https://www.coursehero.com/file/45686976/The-Stakeholder-CEOs-Main-WSJ201908pdf/> (last visited Sep 10, 2019).

⁵ Andrew Sorkin, How Shareholder Democracy Failed the People Nytimes.com (2019), <https://www.nytimes.com/2019/08/20/business/dealbook/business-rountable-corporate-responsibility.html> (last visited Sep 10, 2019).

⁶ Steve Denning, Making Sense of Shareholder Value: 'The World's Dumbest Idea' Forbes.com (2019) <http://www.forbest.com/sites/stevedenning/2017/07/17/making-sense-of-shareholder-value-the-worlds-dumbest-idea/> (last visited Sep 10, 2019).

⁷ Richard Mann & Barry Roberts, Smith and Roberson's Business Law p. 19 (12 ed. 2002).

⁸ James Sanford & Catherine Jones-Ridders, Triple Bottom Line (3BL) and Sustainability - A Major Change in Corporate Management, Proceedings, Decision Sciences Institute, p. 213 (2017).

⁹ Amartya Sen, Introduction. The Theory of Moral Sentiments. By Adam Smith. 6th ed. 1790, New York: Penguin, 2009

recognizing that businesses exist primarily to benefit shareholders.¹⁰ At that time, the Business Roundtable formally embraced this concept in outlining corporate governance principles.¹¹

Now, in 2019, the Business Roundtable is endorsing a major shift in the philosophy governing corporate management. Rather than emphasis on only profits and shareholder value, it is proposed that management consider all stakeholders in managing the corporation.¹²

Why has the Business Roundtable made this change?

The Business Roundtable is an association of the largest businesses in America, serving primarily as a lobbying organization for business interests. Currently, it is led by Jamie Dimon, the chief executive of JPMorgan Chase. In proposing this management change, the Roundtable is recognizing the heightened scrutiny companies currently face. Today, perceptions have changed and business as usual is no longer acceptable. People expect more from corporations than just producing profits for their shareholders. Also, this shift acknowledges that corporate stakeholders are pushing companies into sensitive social and political issues, especially after the failure of governments to effectively deal with various issues.

For example, businesses are being criticized for not paying employees greater wages compared to business executives, not doing anything about a new immigration policy, not paying their fair share of taxes, not doing enough to protect the environment, and for moving jobs overseas. Also, business is criticized for not doing enough on diversity in the workplace and not doing enough to quell the problem of gun violence in America. Presidential candidates, Senators Bernie Sanders and Elizabeth Warren, have been two of the loudest voices calling on business to take more responsibility on social issues.¹³

Clearly business has an opportunity to make a difference in our society today since government does not seem to effectively meet many of these challenges. As Jamie Dimon said, “The American dream is alive, but fraying.”¹⁴

¹⁰ Detroit News, Heads of GM, Ford among CEOs rejecting shareholder-centric model, 2019, <http://www.detroitnews.com/story/business/autos/2019/08/19/heads-gm-ford-among-ceos-rejecting-shareholder-centric-model/2050475001/> (last visited Sep 10, 2019).

¹¹ *Id.*

¹² *See Benoit, supra* note 4

¹³ David Yaffe-Bellany & David Gelles, Shareholder Value Is No Longer Everything, Top C.E.O’s Say, New York Times, 2019, <http://www.nytimes.com/2019/08/19/business-roundtable-corporations> (last visited Sep 10, 2019).

¹⁴ *See Sanford & Jones-Ridders supra* note 8.

Of course, there are critics of the Business Roundtable's change of philosophy. Michael Bordo, a Rutgers University economics professor and former student of Friedman, still believes that Friedman was right.¹⁵ Also, not all Roundtable members endorsed the new statement.¹⁶

The Influence of the Sustainability Movement in Changing Corporate Management

Not mentioned in the Roundtable statement was the influence of the sustainability movement in bringing about changes in corporate management. In June of 1992, the United Nations sponsored the first Earth Summit. This initial gathering was held in Rio de Janeiro and 172 countries participated. One of the key discussions focused on solving global warming and global climate change. This conference eventually led to the adoption of the Kyoto Protocol by several countries. The Earth Summit raised awareness of the importance of adopting sustainable practices for the protection of the earth and the people of the planet. By December 2012, 192 countries had adopted the Kyoto agreement.¹⁷

Discussions at the Earth Summit went beyond focusing on the reduction of greenhouse gases and doing something about global climate change. Participants also addressed fixing problems dealing with clean, accessible water for all people, conserving the lands inhabited by indigenous people, and protecting the forests of the world.¹⁸ In summary, the Earth Summit was the start of the sustainability movement and the idea that maximizing profits without protecting the people and the planet might not be an ideal situation.

The phrase "triple bottom line" (3BL) was first coined by John Elkington in 1994 and later explained in his book, Cannibals with Forks: The Triple Bottom Line of 21st Century Business.¹⁹

In his book, Elkington explains that 3BL (TBL) reporting expands traditional reporting framework to take into account not only financial performance (profit) but also performance in the areas of the environment (planet) and the social environment (people). According to Elkington, 3BL is a way to integrate profit maximization along with the goals of sustainability.²⁰

¹⁵ See Benoit, *supra* note 4

¹⁶ *Id.*

¹⁷ C. Breidenich, D. Magraw, A. Rowley, & J. Rubin, The Kyoto Protocol to the United Nations Framework Convention on Climate Change. *The American Journal of International Law*, 92(2), 319, 315-331. doi:10.2307/2998044 (1998).

¹⁸ United Nations Conference on Environment and Development, "Rio Declaration on Environment and Development," www.habitat.igc.org (last visited Sep 10, 2019).

¹⁹ Jones-Ridders, C., & Sanford, J., *Including Discussions of Sustainability and Ethics in Introduction to Business Classes*, M-PBEA Journal, p. 18-22 (Fall 2016).

²⁰ *Id.*

The 3BL movement gave rise to the management philosophy that business should manage to make a profit and yet do so considering the planet (reducing one's ecological footprint) and people (not exploiting people or paying low wages). The 3BL movement generated the idea that a business should make profits in a manner which leaves the people and the planet in a better place for future generations.

Since the original Earth Summit and the growth of the 3BL movement, the sustainability movement continues to grow. For example, in 2006, former Vice President Al Gore, initiated a campaign to educate the people of the world about the terrible consequences of global warming. Gore helped produce a documentary film titled, *An Inconvenient Truth*, that was recognized with an Academy Award. The point of the film is that global warming is real, it is caused by humans, and is potentially catastrophic if the people of the world ignore this reality. Many scientist endorsed the thesis of this movie.²¹ Also, in 2007, Al Gore and the intergovernmental Panel on Climate Change were recognized with the Nobel Peace Prize for "... their efforts to build up and disseminate greater knowledge about man-made climate change, and to lay the foundations for the measures that are needed to counteract such change."²² Then, in 2015, *The Paris Agreement* was adopted within the context of the United Nations' Framework Convention on Climate Change (UNFCCC) governing carbon dioxide reduction measures for 2020. In general, this was a promise by many countries of the world to reduce their carbon-output and do their best in limiting global warming.²³

As a result of the sustainability movement and the growth of the 3BL reporting, it is understandable that the business community now recognizes there is more to business operations than maximizing profits. Additionally, these trends demonstrate the need to prepare the business leaders of the future to function within this new paradigm.

Business Students Can Make a Difference in the World

Whenever there is a change, it often happens slowly. In the 1980s, if you were a friend of the environment, some would criticize you and call you a "tree hugger" or "an environmental wacko." Today, almost all businesses want to be seen as environmentally friendly. For an example of this trend, one need look no further than the gas guzzling Ford Explorer. Because of its reputation, the Explorer was put on a list of cars unfriendly to the environment. Subsequently, sales of the Explorer dwindled, and Ford reinvented the Explorer. In 2011 a new version of the vehicle was introduced, and Ford marketed it as a "green machine with an "eco-advantage" (most of the car could be recycled, seats were made with soy foam, and gas mileage

²¹ Seth Borenstein, *Scientist OK Gore's Movie for Accuracy*, The Washington Post, (June 27, 2006).

²² The Nobel Prize, <https://www.nobelprize.org/prizes/peace/2007/gore/prize-presentation/>
(last visited Sep 13, 2019).

²³ Paris Agreement within the United Nations Framework Convention on Climate Change (UNFCCC), <http://www.quora.com/What-is-Paris-agreement-in-simple-term>,
(last visited Sep 13, 2019).

was much improved).²⁴ This change of attitude toward the environment took several years but it happened because people came to appreciate the importance of doing something about climate change and saving the environment.

This gradual, slow change is going to be the same with corporate management shifting from an emphasis on only profits and shareholder value to managing the corporation considering all stakeholders (following the change proposed by the Business Roundtable). This change will take time and business students can be part of the change. For example, business needs more diversity at every level. Enlightened business leaders will push for this reform in managing today's businesses. Other changes will include increasing wages and benefits for employees as business profits increase, doing more to reduce the business' environmental footprint, and speaking-up about issues of today. Recently, the Business Roundtable issued a statement denouncing the government's immigration policies describing family separations as "cruel & contrary to American values."²⁵

Conclusion

This is an exciting time for business students to study corporate management and be part of the coming change adopted by the Business Roundtable. Students will be graduating and going into business where they can use their knowledge to serve all stakeholders and make the world a better, more sustainable place. Professors of business, when teaching about corporations and the role of shareholders, directors, and officers, have a responsibility to ensure that students understand this fundamental change in the philosophy behind business management. Indirectly, professors will also be part of making the world a better place for all the planet's inhabitants.

²⁴ Ford Explorer Brochure,
<https://www.ford.com/services/assets/Brochure?make=Ford&model=Explorer&year=2011&postalCode=55401> (last visited Sep 13, 2019).

²⁵ See Detroit News Staff, *supra* 10.

LET'S (NOT) PLAY: HOW YOUTUBE'S USE RULES ALLOW COPYRIGHT OWNERS TO CURTAIL LEGAL FAIR USE

by

Jessica A. Magaldi*

Jonathan S. Sales**

Wade Davis***

Introduction

The creation of YouTube in 2005 and the subsequent development of Let's Play videos transformed the way video game players experienced video games. Instead of simply playing video games, the Let's Play phenomenon gave players the ability to record and upload to YouTube livestream videos of themselves playing their favorite games, while providing commentary and tips, and entertaining their viewers.¹ This Article examines what happens when a cutting-edge online trend redefining how video game players experience gaming runs head-on into the copyright interests of one of the world's largest video game producers. This conflict was illustrated when Nintendo was forced to respond to a craze that swept the internet in the 2010's – Let's Play videos. We examine Nintendo's *Legend of Zelda* franchise, particularly *Twilight Princess*, to determine the potential copyright violations of Let's Play videos, and to try to understand the strategic business decisions Nintendo contended with in determining how to respond in a manner that addresses its copyright interests along with the interests of Let's Play creators and its customers.

1. The Copyright Act and the Fair Use Defense

Section 106 of the Copyright Act of 1976,² which sets forth the exclusive rights of copyrightable owners, states:

Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

* Associate Professor, Pace University

** Lecturer, Bentley University

*** Assistant Professor, Minnesota State University, Mankato

¹ Ivan O. Taylor Jr, *Video Games, Fair use and the internet: The plight of the Let's Play*, J.L. TECH & POL'Y. 247, 248-49 (2015).

² 17 U.S.C. § 106 (1976).

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
5. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
6. in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.³

Section 107 of the Copyright Act,⁴ sets forth the fair use defense as follows:

Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.⁵

2. YouTube and Content ID

YouTube is an Internet-based sharing website that allows its members and the general public to upload, store, view, and share video content on the Internet. This process was monetized by charging third parties to advertise to YouTube viewers when they watched videos

³ 17 U.S.C. § 106 (1976).

⁴ *Id.* § 107.

⁵ *Id.* § 107.

on the site. Users posting videos through YouTube’s Partner Program were able to earn a percentage of the advertising proceeds generated when their videos were viewed.⁶

Under YouTube rules, copyright owners had the right to receive the revenue from any uploaded video containing part of the owner’s original content. To help prevent copyright infringement, YouTube created a Content ID tool that helped its partners and copyright owners identify and report copyright violations. Content ID used a complex algorithm that compared a database of known copyright-protected materials with videos posted on YouTube. When Content ID returned a match, the copyright owner (*e.g.*, Nintendo) had several options; it could take no action, block the offending video, or claim the advertising revenues from the video.⁷

Gaming enthusiasts quickly embraced YouTube as a forum to communicate with one another and share content, including videos of themselves playing through and commenting on popular video games.⁸ A particular genre of video known as “Let’s Play” contain videos of the content creators’ personal game play along with their dialogue, critique and analysis, humor and, often, in-depth strategies for playing the video game.⁹

3. *Let’s Play* Videos

By 2015, MasaeAnela was an established and popular YouTube personality at the leading edge of a trend that redefined how people played and experienced video games. After a few years, MasaeAnela was producing and posting hundreds of Let’s Plays videos.¹⁰ “Let’s Play” is a video showing a person playing a videogame, with a voice-over of the person’s dialogue providing in-depth strategy, delivering commentary on the video game, talking about life, and often just being funny and witty.¹¹ Let’s Play videos also often show the face of the person playing in the corner of the screen.

⁶ *How to earn money on YouTube*, YOUTUBE HELP (last visited Aug. 27, 2019), <https://support.google.com/youtube/answer/72857?hl=en>;

Chris Castle, *YouTube Revenues Explainer*, MUSIC TECH SOLUTIONS (Mar. 20, 2016), <https://musictech.solutions/2016/03/20/youtube-revenues-explainer/>.

⁷ *How Content ID works*, YOUTUBE HELP (last visited Aug. 29, 2019), <https://support.google.com/youtube/answer/2797370>.

⁸ Chris Kohler, *Why does Nintendo want this superfan’s YouTube money?* WIRED (Mar. 27, 2015), <https://www.wired.com/2015/03/nintendo-youtube-creators/>.

⁹ Ivan O. Taylor Jr, *Video Games, Fair use and the internet: The plight of the Let’s Play*, J.L. TECH & POL’Y. 247, 248-49 (2015).

¹⁰ Harrison Jacobs, *Here’s why PewDiePie and other ‘Let’s Play’ YouTube stars are so popular*, BUSINESS INSIDER (May 31, 2015), <https://www.businessinsider.com/why-lets-play-videos-are-so-popular-2015-5>;
What is a YouTube Let’s Play gaming video? MEDIKIX (Feb. 3, 2016), <http://mediakix.com/2016/02/what-is-a-youtube-lets-play-video/#gs.IUTeuHQ>.

¹¹ Harrison Jacobs, *Here’s why PewDiePie and other ‘Let’s Play’ YouTube stars are so popular*, BUSINESS INSIDER (May 31, 2015), <https://www.businessinsider.com/why-lets-play-videos-are-so-popular-2015-5>;
What is a YouTube Let’s Play gaming video? MEDIKIX (Feb. 3, 2016), <http://mediakix.com/2016/02/what-is-a-youtube-lets-play-video/#gs.IUTeuHQ>.

By 2019, MasaeAnela's YouTube channel showcased 1,800 video uploads; most of which were Let's Plays of her playing Nintendo games. She had over 120,000 subscribers, and her videos had been viewed over 35 million times.¹² She was best known for her deep love of the *Legend of Zelda* video game franchise, and her extensive posting of Let's Play videos of those games.¹³

One specific Let's Play video showed her playing the game *Twilight Princess*; one of the video games from the *Legend of Zelda* franchise owned by Nintendo.¹⁴ In the video, MasaeAnela played through a portion of the game, while expressing her devotion to Nintendo and love of Nintendo and its games.¹⁵ In addition to being an outlet for creativity, the video earned MasaeAnela revenue through YouTube's Partnership program.¹⁶

As the developer of the *Legend of Zelda* video game franchise, including the *Twilight Princess* title, Nintendo owned the copyrights for these video games.¹⁷ Nintendo's ownership rights extend to game characters, storyline narrative, music, software source code, visual display, and other intangibles related to its games.¹⁸

As creator of the *Legend of Zelda* franchise and the holder of its copyright, Nintendo was a YouTube partner.¹⁹ It participated in Content ID, YouTube's copyright violation enforcement program.²⁰ In 2013, Nintendo registered its copyrighted video game content with YouTube, and began using YouTube's Content ID program to determine whether posted videos contained its copyrighted material. These efforts were designed to "ensure Nintendo content [was] shared across social media channels in an appropriate and safe way."²¹

¹² *YouTube Stats Summary*, SOCIALBLADE (last visited Aug. 27, 2019), <https://socialblade.com/youtube/user/masaeanela>.

¹³ *MasaeAnela*, YOUTUBE CHANNEL, (last visited Aug. 27, 2019), https://www.youtube.com/channel/UCjt_KgZ6rREkub3YW73KVoA.

¹⁴ Chris Kohler, *Why does Nintendo want this superfan's YouTube money?* WIRED (Mar. 27, 2015), <https://www.wired.com/2015/03/nintendo-youtube-creators/>.

¹⁵ *Id.*

¹⁶ Chris Kohler, *Why does Nintendo want this superfan's YouTube money?* WIRED (Mar. 27, 2015), <https://www.wired.com/2015/03/nintendo-youtube-creators/>;

How to earn money on YouTube, YOUTUBE HELP (last visited Aug. 27, 2019), <https://support.google.com/youtube/answer/72857?hl=en>.

¹⁷ *The Legend of Zelda: Twilight Princess HD*, NINTENDO (last visited Aug. 27, 2019), <https://www.nintendo.com/games/detail/the-legend-of-zelda-twilight-princess-hd-wii-u>.

¹⁸ 17 U.S.C. § 102 (1976).

¹⁹ Chris Kohler, *Why does Nintendo want this superfan's YouTube money?* WIRED (Mar. 27, 2015), <https://www.wired.com/2015/03/nintendo-youtube-creators/>.

²⁰ *Id.*

²¹ Mike Futter, *Nintendo opts to earn youtube ad revenue on videos featuring its games*, GAME INFORMER (May 16, 2013), <http://www.gameinformer.com/b/news/archive/2013/05/16/nintendo-opts-to-earn-youtube-ad-revenue-on-videos-featuring-its-games.aspx>.

YouTube's Content ID reported that MasaeAnela's Let's Play video contained Nintendo's copyright material from the *Twilight Princess* game.²² Given that the video included visual and sound components from the underlying *Twilight Princess* game, the video implicated Nintendo's copyright rights. MasaeAnela's *Twilight Princess* Let's Play video was identified by YouTube's Content ID as using Nintendo copyrighted materials.²³ Using YouTube's process, Nintendo initially asserted that the video was a copyright violation under YouTube's policy and redirect the advertising revenues earned from the videos. According to YouTube's policies, Nintendo could have also demanded YouTube to take down of the offending videos.²⁴

Nintendo's position was supported by the central tenets of United States copyright law, as codified by § 106 of the Copyright Act.²⁵ Section 106 provides a content creator or owner of a copyright the exclusive right to control the use of its creative works for 95 years from first publication or 120 years from creation, whichever is shorter.²⁶ MasaeAnela's use of the Nintendo content without permission, however, may have arguably been protected by the fair use doctrine, codified in § 107.²⁷ The fair use doctrine provides defenses to copyright violation claims when the purpose of the content is for criticism, comment, or teaching, or when a derivative work uses the source work in completely new or unexpected ways to yield what amounts to a new, independent creative work.²⁸

In addition to the parties' legal rights, an important consideration is the efficiency of traditional make-it-protect-it business models as compared to models based upon open innovation. Using an open innovation model, original creators allow for more open interactions of their products, content and services with external actors with the intent to forge symbiotic relationships that result in greater value creation.²⁹ In other words, even if Nintendo had the legal right to prevent Let's Play videos from being posted to YouTube or to capture all of the profits from such videos, was it a smart, strategic business move to do so?

The primary target audience of this critical incident are students in undergraduate or graduate business law or communication studies courses that address the topics of intellectual property, technology, digital media law, or cyberlaw. This critical incident has been used in

²² Chris Kohler, Why does Nintendo want this superfan's YouTube money? WIRED (Mar. 27, 2015), <https://www.wired.com/2015/03/nintendo-youtube-creator>.

²³ Chris Kohler, Why does Nintendo want this superfan's YouTube money? WIRED (Mar. 27, 2015), <https://www.wired.com/2015/03/nintendo-youtube-creators/>; *Copyright on YouTube*, YOUTUBE (Aug. 27, 2019), <https://www.youtube.com/yt/about/copyright/#support-and-troubleshooting>.

²⁴ Chris Kohler, Why does Nintendo want this superfan's YouTube money? WIRED (Mar. 27, 2015), <https://www.wired.com/2015/03/nintendo-youtube-creators/>;

How to earn money on YouTube, YOUTUBE HELP (last visited Aug. 27, 2019), <https://support.google.com/youtube/answer/72857?hl=en>.

²⁵ 17 U.S.C. § 106 (1976).

²⁶ 17 U.S.C. § 302 (1976).

²⁷ *Id.* § 107.

²⁸ *Id.* § 107;

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

²⁹ Henry Chesbrough & Adrienne K. Crowther, *Beyond High Tech: Early Adopters of Open Innovation in Other Industries*, 36 R & D MGMT. 229-236 (2006).

undergraduate legal environment of business courses, undergraduate technology and intellectual property courses, and in MBA courses on business law and ethics.

Although the specific incident underlying this critical incident took place between 2013 and 2015, it touches on a constant question for content owners in the digital economy. Should copyright holders aggressively control the use and duplication of their content by their fans and critics, or should they take a more cooperative approach? Nintendo's changing position illustrates several options available to copyright holders and highlights the pros, cons and often-unintended consequences of each.

4. The Argument for *Let's Plays* as Copyright Infringement

U.S. copyright law is derived from Article I, Section 8 of the Constitution, which provides that:

*Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.*³⁰

Title 17 of the U.S. Code (Copyright Act of 1976) sets for the copyright regulatory scheme. Presently, a work made for hire has a copyright “term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first”.³¹ In order to account for prospect of future innovation, the copyright scheme also has an expansive definition of the mediums that may be protected. In this regard, § 102 provides copyright protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”³²

Section 106 provides copyright holders with the exclusive rights to “do and to authorize” the following:

- (1) to reproduce the copyrighted work in copies ...;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies ... of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the

³⁰ U.S. CONST. art. I, § 8.

³¹ 17 U.S.C. § 302 (1976).

³² *Id.* § 102.

- individual images of a motion picture or other audiovisual work,
to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly
by means of a digital audio transmission.³³

The Nintendo website specifically claims the copyright to its video games. In this regard, it displays the following advisement, “Nintendo owns intellectual property rights in its products. These include copyrights, trademarks, and patents.³⁴” The *Legend of Zelda* games, including *Twilight Princess* are Nintendo products within the scope of this pronouncement.³⁵

The U.S. Supreme Court has not issued a decision specifically ruling that video games are protected by copyright. Courts, however, generally accept that video games are copyrightable as “audiovisual works.”³⁶ Under the federal copyright scheme, audiovisual works “consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds. . . .³⁷” The World Intellectual Property Organization further describes the web of copyright protections covering videogames:

*[V]ideo games are complex works of authorship – containing multiple art forms, such as music, scripts, plots, video, paintings and characters – that involve human interaction while executing the game with a computer program on specific hardware. Therefore, video games are not created as single, simple works, but are an amalgamation of individual elements that can each individually be copyrighted.*³⁸

Thus, Nintendo’s video games are clearly within the scope of § 106.³⁹ This, therefore, raises the issue whether Nintendo has a bona fide copyright violation claim against MasaeAnela for producing her Let’s Play and posting it to YouTube without Nintendo’s permission or authorization.

Considering the *Twilight Princess* Let’s Play in conjunction with § 106 demonstrates that Nintendo had a bona fide copyright infringement claim. The Let’s Play uses an unauthorized copy of *Twilight Princess*. Accordingly, it ran afoul of Section 106(1).⁴⁰ MasaeAnela created

³³ *Id.* § 106.

³⁴ *Legal information*, NINTENDO (last visited Aug. 27, 2019), <https://www.nintendo.com/corp/legal.jsp>.

³⁵ *The Legend of Zelda: Twilight Princess HD*, NINTENDO (last visited Aug. 27, 2019), <https://www.nintendo.com/games/detail/the-legend-of-zelda-twilight-princess-hd-wii-u>.

³⁶ *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852 (2d Cir. 1982).

³⁷ 17 U.S.C. § 101 (1976).

³⁸ Andy Ramos et al., *The Legal Status of Video Games: Comparative Analysis in National Approaches*, WIPO. 1, 7 (2013).

³⁹ 17 U.S.C. § 106 (1976).

⁴⁰ *Id.* § 106 (1).

derivative work based upon *Twilight Princess* § 103.⁴¹ This violated Section 106(2).⁴² By posting the Let's Play to her YouTube channel, MasaeAnela distributed the work, facilitated the performance of the work, and displayed the work publicly to her subscribers. Given that Nintendo did not authorize the post, the post violated Section 106(3), (4), and (5).⁴³ To the extent that any of Nintendo's sound track was utilized, subsection 6 was also violated.⁴⁴

It is important to note that Nintendo's claims against MasaeAnela were submitted pursuant to YouTube's policies and rules, and not court proceedings filed pursuant to U.S. copyright law. YouTube's rules provide that all copyright holders have the right to claim and flag their content if posted to YouTube. In executing these rules, YouTube provides a tool it refers to as Content ID to identify the copyright violations.⁴⁵

These rules were implemented by YouTube to comply with the Digital Millennium Copyright Act provisions that offer service providers like YouTube a safe harbor from contributory infringement by providing a notice and takedown remedy if a copyright owner alleges that the content in question was used without its authorization.⁴⁶ YouTube's notice and takedown policy, which is consistent with the § 512,⁴⁷ allows YouTube to avoid copyright violations if it immediately removes content when it is provided notice by a copyright owner of a possible infringement, "even if that notice is based on the smallest iota of *belief* by the copyright owner."⁴⁸

Content ID is a complex algorithmic-based copyright compliance tool.⁴⁹ It allows copyright holders to load materials into YouTube's intellectual property database.⁵⁰ The database contents are then compared to videos loaded to YouTube and a report of matches is generated and provided to copyright holder.⁵¹ The copyright owner then has a number of

⁴¹ *Id.* § 103.

⁴² *Id.* § 106 (2).

⁴³ *Id.* § 106 (3)-(5).

⁴⁴ *Id.* § 106 (6).

⁴⁵ Jonathan Ore, YouTube gaming stars blindsided by Nintendo's ad revenue grab, CBC NEWS (Apr. 6, 2015), <http://www.cbc.ca/news/technology/youtube-gaming-stars-blindsided-by-nintendo-s-ad-revenue-grab-1.3010550>; *How Content ID works*, YOUTUBE HELP (last visited Aug. 29, 2019), <https://support.google.com/youtube/answer/2797370>.

⁴⁶ 17 U.S.C. § 512(a)-(c) (1998).

⁴⁷ *Id.* § 512.

⁴⁸ Nicholas Ribaud, *Youtube, video games, and fair use: Nintendo's copyright infringement battle with Youtube's "Let's Plays" and its potential chilling effects*, 6 BERKELY J. ENT. L. & SPORTS LAW. 114, 122 (2017).

⁴⁹ *How Content ID works*, YOUTUBE HELP (last visited Aug. 29, 2019), <https://support.google.com/youtube/answer/2797370>.

⁵⁰ *Id.*

⁵¹ *Id.*

options. It may elect to take no action. It may block or mute the offending video. It may claim advertising revenues generated by its copyrighted material. Finally, it may monetize the video with advertising of its choosing and retain the revenues derived from YouTube.⁵²

Nintendo initially elected the final option, claiming all of MasaeAnela's advertising revenue derived from the video.⁵³

5. A Fair Use Analysis of *Let's Plays*

The fact that Nintendo had the right to assert its copyright claim does not provide the final resolution of the issue. The fact that MasaeAnela's *Twilight Princess Let's Play* is a derivative work raises the issue as to whether it falls within the protections of the Fair Use doctrine.

The U.S. copyright scheme codifies the fair use defense at § 107.⁵⁴ It is a defense to a claim of copyright infringement. Specifically, fair use allows for derivative use of copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."⁵⁵ Four factors are involved in evaluating a fair use defense:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁵⁶

Aspects of the 1994 U.S. Supreme Court case of *Campbell v. Acuff-Rose Music*,⁵⁷ are instructive with respect to the *Let's Play* at issue. In 1989, the popular rap group "2 Live Crew" released a recording entitled "Pretty Woman." The recording sampled the distinctive "hook" or "riff" and its opening lyrical phrases of the 1964 popular song "Oh, Pretty Woman," recorded by Roy Orbison. The Supreme Court case noted, "2 Live Crew not only copied the bass riff and repeated it, but also produced otherwise distinctive sounds, interposing 'scraper' noise, overlaying the music with solos in different keys, and altering the drum beat."⁵⁸ 2 Live Crew also added its own words over the samples.

⁵² *Id.*

⁵³ Chris Kohler, Why does Nintendo want this superfan's YouTube money? WIRED (Mar. 27, 2015), <https://www.wired.com/2015/03/nintendo-youtube-creators/>.

⁵⁴ 17 U.S.C. § 107 (1976).

⁵⁵ *Id.*

⁵⁶ 17 U.S.C. § 107 (1976).

⁵⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁵⁸ *Id.* at 589.

The copyright holder of the 1964 Roy Orbison song, Acuff-Rose, refused to grant 2 Live Crew permission to use its work. Notwithstanding this denial, 2 Live Crew claimed fair use, sampled the Orbison song, and released its recording to the public as part of the album, “As Clean As They Wanna Be.” 2 Live Crew cited Roy Orbison and William Dees as the composers and Acuff Rose as the publisher.

Acuff Rose brought suit for copyright infringement in the U.S. District Court. The District Court found that 2 Live Crew was not liable for copyright infringement pursuant to the doctrine of fair use. The Circuit Court of Appeals reversed and held that 2 Live Crew’s “blatantly commercial purpose . . . prevents this parody from being a fair use.”⁵⁹

The Supreme Court reversed the Court of Appeals ruling and remanded the case, and it held that the commercial nature of 2 Live Crew’s recording did not *per se* preclude a finding of fair use and reasoning; that it did not appreciably devalue the market value of Roy Orbison’s original work by including an excerpt of the song in 2 Live Crew’s derivative rap song.⁶⁰

Accordingly, the fact a derivative work is involved in commercial use does result in the *per se* denial of a fair use claim. This means that, although the fact that MasaeAnela earned advertisement revenues from her *Twilight Princess* Let’s Play does not, by itself, preclude a fair use defense. Additionally, the sampling engaged in by 2 Live Crew may provide some analogy to the use of the game play underlying the Let’s Play video.

Applying the § 107 factors,⁶¹ to MasaeAnela’s *Twilight Princess* Let’s Play does not yield a definitive conclusion as to fair use. As to the first factor, the purpose and character of the use, MasaeAnela had both creative and commercial motivations. Although she was earning money from her Let’s Play videos, she claims that she was inspired to create the videos by her devotion to the video game, but also understood that it would generate advertising revenues.⁶² The video also provided commentary about the game and advice for playing the game. Thus, this factor does not present a definitive finding as to whether it supports a fair use defense.

The second factor is the nature Nintendo’s copyrighted work. As noted in the *Campbell* case,⁶³ the *Twilight Princess* video game is a “creative expression for public dissemination [which] falls within the core of the copyright’s protective purposes.”⁶⁴ Although the specific characteristics of a particular Let’s Play are different, courts are more likely to find Fair Use when the derivative materials sufficiently transform the initial materials into a larger

⁵⁹ *Id.* at 574.

⁶⁰ *Id.* at 594.

⁶¹ 17 U.S.C. § 107 (1976).

⁶² Chris Kohler, Why does Nintendo want this superfan’s YouTube money? WIRED (Mar. 27, 2015), <https://www.wired.com/2015/03/nintendo-youtube-creators/>.

⁶³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁶⁴ *Id.* at 586.

commentary or criticism.⁶⁵ Some commentators go so far to argue that Let's Play videos may be "offered for a public use, like a stand-up comedy."⁶⁶ Thus, depending on the amount and type of criticism, commentary and critique added by MasaeAnela, this factor may or may not weigh in the favor of fair use.

The third factor involves a consideration of the relative portion of the original work utilized in the derivative work. Courts look to the quantity of the original material copied, as well as the quality and importance of the material copied.⁶⁷ Here, the more that the *Twilight Princess* game play was used in the Let's Play video, the weaker the fair use defense. Another indeterminate factor is whether the Let's Play utilized any part of Nintendo's sound track. The less sound used the stronger argument in favor of fair use.

The fourth factor regarding requires considering whether the derivative work devalues the market potential of the original work. This factor, again, is not dispositive. One view of the Let's Play videos is that they enhance the market potential of the original work by creating word of mouth support or buzz, thereby driving increased demand for the original video game:

*Since these [Let's Plays] are simply showing video game gameplay to their followers, they cannot replace the experience of buying and playing the game for oneself. It may very well be the opposite, that the publicity will boost the video game sales rather than impede them.*⁶⁸

Others explain that watching others play video games creates a social bond and community connections with others, even if only virtual connections in cyberspace and the gaming community.⁶⁹ This casts YouTube content creators such as MasaeAnela in the role of ambassador's for Nintendo and its original content. Under this view, the fourth factor arguably supports the prospect of a fair use defense.

Alternatively, MasaeAnela is using Nintendo's copyright protected content to generate advertising revenues. This may be viewed as a misappropriation Nintendo's income. It may also suggest that it serves as a substitute for the original video game or Nintendo's newer titles by disclosing game secrets and diverting demand towards the Let's Play. If this critique is accurate, the derivative Let's Play works may devalue the market potential of Nintendo's original work.

⁶⁵ *Twin Peaks Production v. Publishers International, Ltd.*, 996 F.3d 1366 (2d. Cir. 1993).

⁶⁶ Nicholas Ribaud, *Youtube, video games, and fair use: Nintendo's copyright infringement battle with Youtube's "Let's Plays" and its potential chilling effects*, 6 BERKELEY J. ENT. L. & SPORTS LAW. 114, 127 (2017).

⁶⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁶⁸ Nicholas Ribaud, *Youtube, video games, and fair use: Nintendo's copyright infringement battle with Youtube's "Let's Plays" and its potential chilling effects*, 6 BERKELEY J. ENT. L. & SPORTS LAW. 114, 127-8 (2017).

⁶⁹ Julie Muncy, *Why I watch people play videogames on the internet*, WIRED (Aug. 21, 2016),

<https://www.wired.com/2016/08/why-i-watch-lets-plays/>.

Notably, the evaluation of a fair use is fact-specific and will vary based on the specific nature of each Let's Play video. The multifactor case-by-case analysis means that specific Let's Play videos will fall upon on a fair use spectrum depending on the contents and purpose of each video.⁷⁰

The forgoing suggests that a fair use defense, if interposed by MasaeAnela, may possibly prevail, but the ultimate determination is uncertain. A ruling by a court or jury may very well hinge on whether it finds that the game is sufficiently transformed by MaseaAngela's commentary and critique. If so, her unique contributions and input would support a finding of fair use. Alternatively, if a court or jury finds the original game play is the essential substantive component of the Let's Play, it might reject the fair use defense.

6. A Consideration of Nintendo's Alternatives to A Copyright Infringement Claim

It appears that Nintendo initially made a business decision to flag MasaeAnela's content in 2013 because Nintendo believed its business interests were being injured or threatened. In this regard, Nintendo explained, "Please keep in mind that infringement of Nintendo's IP rights hurts not only Nintendo, but our players and the legitimate businesses connected with Nintendo."⁷¹ Its position regarding older titles is also instructive:

People Making Nintendo Emulators and Nintendo ROMs [Read Only Memory] are Helping Publishers by Making Old Games Available that are No Longer Being Sold by the Copyright Owner. This Does Not Hurt Anyone and Allows Gamers to Play Old Favorites. What's the Problem?

The problem is that it's illegal. Copyrights and trademarks of games are corporate assets. If these vintage titles are available far and wide, it undermines the value of this intellectual property and adversely affects the right owner. In addition, the assumption that the games involved are vintage or nostalgia games is incorrect. Nintendo is famous for bringing back to life its popular characters for its newer systems, for example, Mario and Donkey Kong have enjoyed their adventures on all Nintendo platforms, going from coin-op machines to our latest hardware platforms. As a copyright owner, and creator of such famous characters, only Nintendo has the right to benefit from such valuable assets.⁷²

Thus, Nintendo initially pursued a closed business model based on a build-it-protect-it economic logic.

In contrast, a commentator in *Wired* explained, "Watching [MasaeAnela] makes you want to play *Zelda*. She's an enthusiastic ambassador for Nintendo, hyping its games like no other at a time when the company that introduced *Super Mario* is losing mindshare to *Minecraft*."⁷³ If accurate, this suggests that Nintendo could have increased the revenues

⁷⁰ *Dr. Seuss Enterprise, L.P. v. Penguin Books USA, Inc.* 109 F.3d 1394 (9th Cir. 1997).

⁷¹ *Legal information*, NINTENDO (last visited Aug. 27, 2019), <https://www.nintendo.com/corp/legal.jsp>.

⁷² *Legal information*, NINTENDO (last visited Aug. 27, 2019), <https://www.nintendo.com/corp/legal.jsp>.

⁷³ Chris Kohler, Why does Nintendo want this superfan's YouTube money? *WIRED* (Mar. 27, 2015),

derived from its games by viewing Let's Plays and similar content as compliments that drive demand to its original content. It follows that, rather than requesting the take down of such derivative works or take possession of the advertising revenues, Nintendo could have benefited by supporting and nurturing the creative output of this community of enthusiasts. This would constitute the adoption of an open business model, allowing these outside actors to help expand the user experience by allowing Nintendo's games to be incorporated into Let's Play videos. Such a strategy would essentially pursue an above-the-line advertising strategy by exploiting the buzz and word of mouth generated by its wide community of enthusiasts. This approach might also encourage the creation of a specific interested audience base (people watching Let's Play Nintendo videos) that Nintendo could directly advertise to through YouTube.

It bears noting that Nintendo adopted a compromise position a few years later. In early 2015, Nintendo announced a Creators Program that provided a means for Let's Play content creators to utilize certain approved Nintendo content. The program allowed the use of content on a list of approved games, with the proviso that Nintendo would collect either 40 percent of the advertising revenue generated by the derivative video (*e.g.*, the Let's Play) or 30 percent of the revenue from the YouTuber's personal channel. Additionally, Nintendo reserved the right to approve all videos before they were made available to the public and to modify the terms of the Creators Program agreement.⁷⁴ In this way, Nintendo appeared to be shifting from the strict make-it-protect-it closed business model to a controlled relationship in which Nintendo partially profited from the efforts of Let's Play creators.

This more open business model involved some symbiotic relationship with influencers or ambassadors in the gaming community pursuant to the terms of its Creators Program. However, it fell short of a truly innovative open business model that supported the community of Nintendo enthusiasts in their effort to create and post derivative works that have the potential to increase overall demand for Nintendo's products and services.

It should be of no surprise that YouTube's Content ID and Nintendo's model were controversial and widely-criticized.⁷⁵ Some video game developers explicitly rejected the option

<https://www.wired.com/2015/03/nintendo-youtube-creators/>.

⁷⁴ Karim Lahlou, Five reasons Nintendo thinks its YouTube creator program is great, *GAME CRATE* (Feb. 6, 2015), <https://www.gamecrate.com/5-reasons-nintendo-thinks-its-youtube-creator-program-great/10024>;

Cass Marshall, The Nintendo creators program draws to a close this December, *MSN* (Nov. 29, 2018)

<https://www.msn.com/en-us/entertainment/gaming/the-nintendo-creators-program-draws-to-a-close-this-december/ar-BBQdUZw>;

Nicholas Ribaldo, *Youtube, video games, and fair use: Nintendo's copyright infringement battle with Youtube's "Let's Plays" and its potential chilling effects*, 6 *BERKELEY J. ENT. L. & SPORTS LAW*. 114, 115 (2017).

⁷⁵ Daniel George, Nintendo Creators Program still falls short for Youtubers, *GAME SIDED* (Jan. 29, 2015), <https://gamesided.com/2015/01/29/nintendo-creators-program-still-falls-short-youtubers/>;

Nicholas Ribaldo, *Youtube, video games, and fair use: Nintendo's copyright infringement battle with Youtube's "Let's Plays" and its potential chilling effects*, 6 *BERKELEY J. ENT. L. & SPORTS LAW*. 114, 116-137 (2017).

James Puddington, Fair play: Economic justifications for applying fair use to the online streaming of video games 21 *B.U. J. SCI. & TECH. L.* 420, 413-438 (2015).

to take down or charge Let's Play video creators. For example, one developer, Deep Silver, proclaimed,

*Deep Silver has no intention of preventing players, who like creating gaming content on YouTube using our games, from doing so... This includes Let's Play... videos that are monetized by a player. Whether your opinion of our games is positive or negative in your YouTube video, it is not our right as a games publisher to infringe on your basic right to voice your opinion freely.*⁷⁶

In a recognition of the problems with Nintendo's controversial business model, Nintendo ended its Creator's Program in December 2018, explaining that the company wanted to "make it easier for content creators to make and monetize videos that contain Nintendo game content."⁷⁷ Nintendo's new policy created a more liberal policy loosely following current copyright law; in which its Let's Play creators were allowed to monetize their efforts so long as the new content was more than a simple reproduction of Nintendo's copyrightable video games. The policy stated,

*We encourage you to use Nintendo Game Content in videos and images that feature your creative input and commentary. For example, Let's Play videos and video game review are within the scope of the Guidelines. However, you may not simply upload or livestream an existing Nintendo video, gameplay footage without your own creative input, or a copy of content created by someone else. For example, mere copies of Nintendo promotional trailers, tournaments, music soundtracks, gameplay sequences, and art collections are outside the scope of the Guidelines.*⁷⁸

Undoubtedly, the relationship between video game makers and Let's Play creators will continue to evolve as the technologies, business models, industries change, and user expectations and desires change.

Conclusion

Although YouTube's Content ID and Nintendo's use of it were controversial and widely-criticized, there remains an inevitable conundrum for YouTube creators, in particular those creating Let's Plays. Even though the copyright laws protect the creators of transformative derivative works as a legitimate fair use, to participate on a platform such as YouTube is to consent to the rule it chooses to employ and enforce. In our current copyright environment, these rules overwhelmingly favor copyright owners. For new content creators to try to contest these rules, they risk being banned from the platform and relegated to obscurity so, too often, the pragmatic course of action is to submit to them. And the rules of copyright and fair use that

⁷⁶ Colin Campbell, Deep Silver moves against YouTube copyright claimants, POLYGON (Dec. 11, 2013), <https://www.polygon.com/2013/12/11/5201394/deep-silver-moves-against-youtube-copyright-claimants>.

⁷⁷ *Nintendo game content guidelines for online video & image sharing platforms*, NINTENDO (Nov. 29, 2018), https://www.nintendo.co.jp/networkservice_guideline/en/index.html?n.

⁷⁸ *Id.*

apply to the creator are not those in the Consitution and the Copyright Act but whatever YouTube says they are.

THE RIVER OF CASE LAW AND THE ENGAGEMENT RING

by Nancy J. White¹

Abstract: This Article presents a short lecture, a reading, and an in-class exercise designed to efficiently teach students how case law is made in a typical court system. The content is based on an analogy to a river. Cases go upstream in the river of case law, starting from the trial court, moving to the appeal court, and finally to a supreme court. Law, as compared to cases, flows downriver in the river of case law. That is, law from an appeal court is put into the river of law but flows downriver (is precedent for) only to the courts below that appeal court. Law from a supreme court is put into the river at the headwater and flows down into all of the courts in the system and is therefore precedent for all of the courts in the system.

I. River of Case Law

Every undergraduate business law and legal environment of business text contains a section outlining how the judicial branch operates.² These sections explain how case law is made but the process is so different from what students have studied regarding how statutory law is made, confusion often results. This Article presents a short lecture, a reading, and an in-class exercise designed to efficiently teach students how case law is made in a typical court system. The content is based on an analogy to a river that is the “River of Case Law”. Cases go upstream in the river, starting from the trial court, moving to the appeal court, and finally to a supreme court. Law, as compared to cases, flows downriver, that is law from an appeal court is put into the river of law but flows downriver only to the courts below that appeal court. Law from a supreme court is put into the river at the headwater and flows down into all of the courts in the system.

The short lecture³ (3min:58sec) on how the River of Case Law operates is available at <https://youtu.be/yKnWqiAmSDQ>. The reading is below in Part 2. Part 3 contains the in-class exercise with key and also the quiz based on the reading and the exercise. This exercise assumes students are somewhat familiar with federalism, state law issues, and the concept of federalism, that is that each state and the federal government has its own court system.

The exercise is based on following imaginary case law with regard to the legal issue of “who owns an engagement ring if the engagement is broken off and the parties never marry?” The exercise can be used in any state with the possible exception of Montana. Most states, but not Montana, have resolved this issue by establishing case law holding something to the effect of: if the engagement is broken off, the ring is returned to the giver and belongs to the giver. You may wish to research your state’s law to verify this.

¹ Department of Finance and Law, Central Michigan University

² Henry R. Cheeseman, *Business Law*, 10th ed., p. 1-90, Pearson (2018); Meiners, Ringleb, Edwards, *The Legal Environment of Business*, 12th ed., p. 25-79, Cengage Learning (2014).

³ All pictures and video clips in the online lecture, “River of Law” are open source from pixabay.com.

2. River of Case Law Reading

Case law comes into being through disputes filed in a court system. To understand how this process works the “river of case law analogy” described below is used to show you how case law comes into being. Look below at Figure 1: River of Case Law. Notice the river. Trial courts are at the end (bottom of the figure) of the river and this is where cases start. Cases then move upriver to the appeal court if one of the parties chooses to appeal. Appeal courts are required to review the trial court decision (appeal of right). After the appeal court makes its decision the case can move to a supreme court however supreme courts choose which cases to hear, parties have no right that a supreme court hear their case. If the supreme court decides not to hear the case, the decision of the appeal court is final.

You may be familiar with how statutory law, that is law made by legislative bodies such as your state legislature or U.S. Congress, comes into being, that is, how a bill becomes a law. You may be familiar with the Schoolhouse Rock song, “How a Bill becomes a Law” (<https://www.youtube.com/watch?v=Otbml6WlQP0>) but that process is very different from how case law comes into being.

Case law comes from, well, cases! A case starts in a trial court and can be appealed upriver to an appeal court. It is at this step, the appeal court, that some case law can be put into the river of case law. Not all appeal court cases make case law – the appeal court may decide the case on existing law only. However, if no existing law can be found, the appeal court can make the law necessary to decide the case. The same is true for a supreme court that is a supreme court can decide a case on existing law but usually a supreme court only takes a case if no existing law can be found to resolve the legal issue presented and law must be made in order to resolve the case.

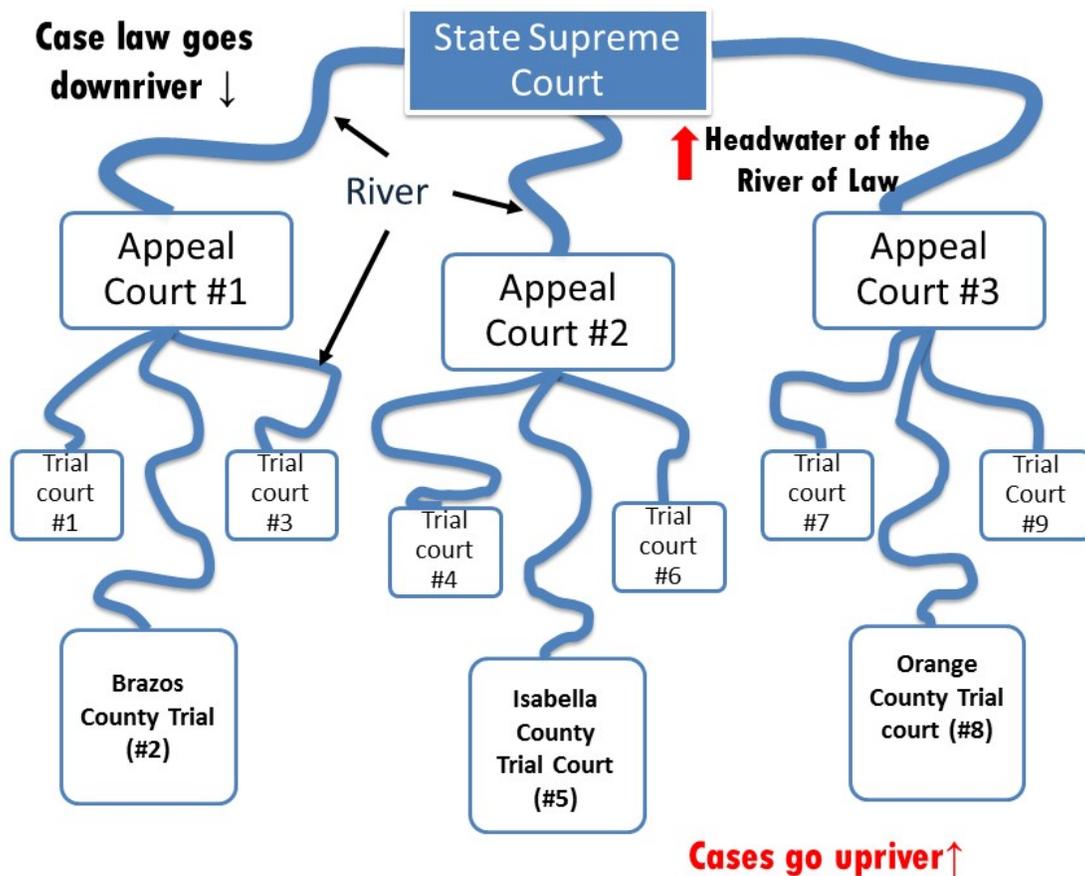


Figure 1: River of Case Law

For example, assume the following sequence of events:

- Party A is fired because she wore a headscarf to work. Party A files a case in Trial Court #1 asking the trial court to resolve this legal issue, “Does the law allow someone to be fired for wearing a headscarf required to be worn by their religion?”
- Assume Trial Court #1 says, “Yes, the law says someone can be fired for wearing a head scarf even if the scarf is required by their religion under the employment at will doctrine that says, ‘anyone can be fired for any reason or no reason.’”⁴ Party A may or may not take the case to appeal.
- Assume Party A appeals Trial Court #1’s decision to Appeal Court #1 and Appeal Court #1 upholds Trial Court #1’s ruling stating the law is: The allows someone to be fired for wearing a headscarf even if their religion requires it.
- Assume Party A appeals to the State Supreme Court but the State Supreme Court refuses to take the case. This is common because State Supreme Courts choose which cases to take and usually do so only after several cases have been heard at lower levels.
- Several years later Party B files a case in Trial court #6 asking the same legal

⁴ This is a simplified overview of the law.

issue: Can someone be fired for wearing a headscarf. Assume Trial Court #6 says no, the law does not allow someone to be fired for wearing a headscarf that is required by their religion and employers must make reasonable accommodation for people who wear them because of their religion. Notice that this decision is the opposite of the decision made by Appeal Court #1.

- Assume the losing party in the above case (the employer) appeals this case to Appeal Court #2 and that court upholds Trial Court #6's ruling and says the law is: "the law does not allow someone to be fired for wearing a headscarf required by their religion, the employer must make a reasonable accommodation".
- Now, the state supreme court is likely to take a case involving this issue because of the conflicting law made by Appeal Court #1 (someone can be fired for wearing a headscarf at work) and Appeal Court #2 (someone cannot be fired for wearing a headscarf at work).
- Assume the state supreme court takes the case and rules that the state constitution does not allow employers to fire someone for wearing a headscarf required by their religion but must make a reasonable accommodation for people who wear them for religious reasons. This law made by the state supreme court flows downriver from the state supreme court to all of the courts below it and is now the law of the state.

In order to complete the River of Law In-Class exercise you are expected to already understand the concept of federalism as it exists in the United States, that is that the United States is a federation of made up of semi-independent states, tribes, and other territories. Each of these semi-independent entities has its own court system and some laws that apply only within the area controlled by that entity. For example, laws made by Michigan are only applicable in Michigan. Laws made by California are only applicable in California. Laws made by the Saginaw Chippewa Tribe are only applicable on their reservation. Laws made by Puerto Rico are only applicable in Puerto Rico.

In addition, you must know what a law is. A law is a standard of behavior established by a government or the definition of any word used in a standard of behavior of a government. Laws apply to everyone and are enforced by governments. If a person breaks a law they are subject to criminal and/or civil penalties – that is they can be taken to court.

You must also know the difference between case law and statutory law. Two important differences exist between case law and statutory law. The first difference is who makes that law. Statutory law is made by legislative bodies such as your state legislature or U.S. Congress. Case law is made by judges. Another difference is who is controlled by the law. Statutes control everyone as of the moment they are made or the effective date as established by the legislative body. Case law, until it is made by a supreme court, is only binding on some in the jurisdiction. The River of Case Law exercise is designed to make it clear how case law is made and who it controls. Another big difference between statutory law and case law is that case law is made to clarify statutory and constitutional law. The River of Case Law exercise does not involve any constitutional law issues and you can tell because no constitutions are used to support the conclusions.

You must also know what a legal issue is. A legal issue is one asking something like, “What does the law say about _____?” or “What is the law on this topic?” If the issue or question is something like, “Who wins?” or “What happened here?” it is not a legal issue. A “Who wins?” issue can be called an overall issue and a “What happened here?” issue is a factual issue.⁵ For this exercise you only need to understand that you are dealing with a legal issue, that is what does the law say about the topic presented.

⁵ An in-depth understanding of the distinction between overall, factual, and legal issues is not needed for this exercise.

2. River of Case Law In-class Exercise

Instructions to instructors:

1. Remove everything in red from the in-class exercise, including these instructions. The words in red in the exercise are the key so keep a copy.
2. Students must have some understanding of federalism and recognize that some issues, such as the one presented here, are state law issues. This concept, as well as the ones mentioned below, should be given to the students before the exercise.
3. Students must have some understanding of the difference between statutory law and case law.
4. Unless you are from Montana, you may wish to substitute the name of your state for “Michigan” in the exercise to make it more relevant. As far as the author knows, every state except Montana has decided the issue presented in this exercise the same as here. You may wish to research your particular state’s law however. Only Isabella County trial court exists in Michigan. Brazos County is in Texas and Orange County is in California.
5. Copy the exercise and give it to the students.
6. Review the instructions with the students.
7. Divide the students into groups.
8. Tell the group to look only at Case #1 and answer the questions about Case #1. Explain the laws given at the beginning of the exercise and go over the questions. Give the students about 5 minutes to read the case and answer the questions.
9. Review the answers to the questions related to Case #1 with the students. Put the students back into groups.
10. Repeat with Case #2 and #3, that is have the students break up into groups, answer the questions, then review the answers with them.
11. Case #4 is slightly different. The case is at the end of the handout but the *questions* are presented as an in-class quiz. I have the students self-grade this quiz in-class using green pens which I provide. This prevents me from having to grade the quizzes. I do spot check them and then enter the grade into the grade program.
12. Note that I use this exercise to review other concepts covered but have removed those questions from this exercise.

Instructions to students: You will be given a series of cases interpreting a particular state statute and the state common law. Look only at Case #1 and the questions related to Case #1 at this time. You will be divided into groups and your group is to pretend they are the appeal court judges deciding the law that applies to the case. Appeal courts usually have 3-5 judges deciding a case.

This exercise is designed to help you understand...

1. What a legal issue is, how to word legal issues, and how to answer legal issues.
2. How courts interpret statutes.
3. How case law comes into being.

4. How courts use case law (often called precedent) in determining later cases.
5. The River of Case Law concept – that is law flows downriver and cases proceed upriver.
6. How a typical court system in the U.S. operates from trial to appeal to supreme court.

River of Case Law: Case 1

LAW (or RULE):

“Engagement rings and other gifts given in contemplation of marriage or engagement are not consideration in support of a contract to marry. No cause of action for breach of a contract to marry is recognized in this state.” MICHIGAN STATUTE #16.009.⁶ (Instructor: Point out to the students that this statute does not answer the legal issue presented. In other words, the statute does not cover the issue presented in the case so the court must clarify or determine the law.)

Title to a gift, that is ownership of a gift, transfers to the receiver of the gift immediately upon transfer of the gift from the giver to the receiver. *Smyth v. Jonnes*, 123 Michigan 456 (1880).⁷ (Very simplified statement of the common law of gifts). (Instructor: Point out to the students that this is a piece of old, established common law in the state and it was made by judges.)

Case #1: Reeves, a resident of California, meets Mandy, a resident of Michigan, county of Orange, while both are on vacation in the Bahamas. He buys her a \$15,000 diamond engagement ring there and gives it to her. However, after they return to the U.S. Mandy decides she does not want to leave her family, her job, her friends, and move to California. She breaks off the engagement. Reeves asks Mandy for the ring back but she refuses saying the ring was a gift and since no cause of action for breach of contract to marry exists, she can keep the ring. Reeves files a lawsuit against Mandy asking for return of the ring in the **Brazos County trial court**.

1. In this case, who broke off the engagement, the giver of the ring or the receiver of the ring?
Receiver
2. What is the *legal* issue raised in this scenario?

Note that if your issue contains the words “Reeves” or “Mandy” it is not the legal issue raised in the scenario. Do not include the word “gift” because it is difficult, though not impossible, to word the legal issue using that word.

The legal issue always asks something like, “What does the law say about _____ (fill in the blank)?” For example, “What does the law say about wearing headscarves at work?” The answer to a legal issue is a law or part of a law. For example, the answer to the legal issue, “What does the law say about wearing headscarves at work?” is “The law says that employers must make a reasonable accommodation for people who want to wear headscarves at work.” Note that this answer is only part of the law regarding this issue.

The reason I do not want you to use the word “gift” is because if you word the legal issue something like, “What does the law say about gifts?” it is wrong because it is much too general. I want you to be more specific so that when you finish this exercise you know the

⁶ This statute number is imaginary and used for the purpose of simplifying this exercise.

⁷ This is an imaginary case for the purposes of simplifying this exercise.

law covering the situation.

NOT ACCEPTABLE: Any issue that includes the name of any of the parties or asks about the particular ring involved here.

What does the law say about who gets an engagement ring when the engagement is broken off? Alternative: What happens to an engagement ring when the engagement is broken off? Anything similar is fine.

3. Who will first decide the answer to this legal issue in this case?
Brazos County Trial court judge or anything similar
4. Who will review whether or not that first person's answer to the legal issue was right?
Appeal court or Appeal Court #1.
5. Reeves wants the answer to the legal issue to be what? Complete the sentence below but if your answer is anything like, "Reeves wants the law to be that Mandy must return the ring to Reeves" your answer is wrong. This answer is not a law but is the decision of the court about who wins or loses. Remember a law is always a general statement and applies to everyone, not just Reeves and Mandy.

Reeves wants the law to be

_____.

Anything similar to: Engagements rings are returned to the giver if the engagement is broken.

6. Mandy wants the answer to the legal issue to be what? Complete the sentence below but if your answer is anything like, "Mandy wants the law to be that Mandy keeps the ring" your answer is wrong. This answer is not a law but is the decision of the court about who wins or loses. Remember a law is always a general statement that applies to everyone, not just Reeves and Mandy.

Mandy wants the law to be

_____.

Anything similar to: Engagement rings are not returned to the giver if the engagement is broken. The more correct legal answer is: Title to engagement rings transfer to the receiver immediately and does not change if the engagement is broken.

Students stop here

Instructor: Stop here and review the answers with the students. Then review the laws below and break the students back into their groups to answer the questions.

River of Case law: Case 2

Instructions: Read the laws below, answer the questions following these laws, read Case #2, answer the questions about Case #2, then stop.

LAW (or RULE):

“Engagement rings and other gifts given in contemplation of marriage or engagement are not consideration in support of a contract to marry. No cause of action for breach of a contract to marry is recognized in this state.” MICHIGAN STATUTE #16.009.

Title to a gift, that is ownership of a gift, transfers to the receiver of the gift immediately upon transfer of the gift from the giver to the receiver. *Smyth v. Jonnes*, 123 Michigan 456 (1880). (Very simplified statement of the common law of gifts).

“If the woman breaks off the engagement, she must return the ring. Engagement rings are a different type of gift and not covered by Michigan Statute #16.009. The ring belongs to Reeves. Trial court’s decision upheld.” *Reeves v. Mandy*, Appeal Court #1(1980). **Draw the students’ attention to this before breaking them into groups then have them answer the questions below, read Case #2 and then answer the questions after Case #2, then stop.**

7. The above quote from the *Reeves* case tells you two things: who won and the law. Who won the case?
Reeves
8. In the Reeves case, who is entitled to the ring, the giver of the ring or the receiver of the ring?
Giver
9. Notice that the *Reeves* case was decided by Appeal Court #1 and now we have a piece of law relating to the legal issue raised. The *Reeves* case says the law regarding engagement rings when the engagement is broken is what? *Hint*: If your answer here contains the words “Reeves” or “Mandy” it is wrong because I am *not* asking for the decision of the court about who wins or loses, that was asked above. I am asking for the law made by Appeal Court #1.

If the woman breaks off the engagement, she must return the ring. Could also include: Engagement rings are a different type of gift and not covered by Michigan Statute #16.009

10. The *Reeves* case is binding on what courts in the river of case law? Look at the diagram at the beginning of this exercise.

Trial courts below Appeal Court #1 or trial courts # 1,2,3. If you also included Appeal Court #1, I will accept it however a court can change its own precedent, just not precedent set by a higher court.

11. Assume Mandy, in the *Reeves* case, wanted to appeal the decision of Appeal Court #1

(given above) further. Where would she file her appeal?

State Supreme Court

12. Assume Mandy appealed her case up to the Michigan state Supreme Court, and they upheld the appeal court's decision. Could Mandy appeal further to the U.S. Supreme Court?

No

13. Why or why not?

Because this is a matter of state law, no federal laws have been raised.

Case #2: Deamon and Angel, both residents of the state of Michigan, county of **Isabella**, became engaged, and at the time of the proposal, Deamon presented Angel with a 2 carat diamond in an 18 karat gold setting valued at approximately \$24,000. They began making wedding plans but shortly thereafter Deamon met Lolita and broke off the engagement with Angel. Deamon asked Angel to return the ring, but she refused. Deamon sued Angel in the Isabella County court for return of the ring. She says she does not have to return the ring since it was a gift and since no cause of action for breach of contract to marry exists, she can keep the ring.

14. In the *Deamon* case, who broke off the engagement, Deamon (the man) or Angel (the woman)?

Deamon, the man

15. In the *Deamon* case, who broke off the engagement, the giver of the ring or the receiver of the ring?

The giver

16. In the *Deamon* case, what is the *legal issue*?

Anything similar to: Who is entitled to an engagement ring when the engagement is broken?

If you approach this entire problem from the "gift" angle then the legal issue is: Is an engagement ring to be treated the same as other gifts with regard to the immediate transfer of title to the receiver?"

Students stop here

Instructor: Stop here and review the answers with the students. Then review the laws below and break the students back into their groups to answer the questions.

River of Case law: Case 3

Instructions: Read the laws below, answer the questions following these laws, read Case #3, answer the questions about Case #3, then stop.

LAW (or RULE):

“Engagement rings and other gifts given in contemplation of marriage or engagement are not consideration in support of a contract to marry. No cause of action for breach of a contract to marry is recognized in this state.” MICHIGAN STATUTE #16.009.

Title to a gift, that is ownership of a gift, transfers to the receiver of the gift immediately upon transfer of the gift from the giver to the receiver. *Smyth v. Jonnes*, 123 Michigan 456 (1880). (Very simplified statement of the common law of gifts).

“If the woman breaks off the engagement, she must return the ring. Engagement rings are a different type of gift and not covered by Michigan Statute #345. Ring belongs to Reeves. Trial court’s decision upheld.” *Reeves v. Mandy*, Appeal Court #1 (1980).

“An engagement ring can be recovered by the donor (usually the man is the donor), if the agreement to marry is dissolved by mutual consent or the woman unjustifiably breaks off the engagement, but cannot be recovered by him if he unjustifiably breaks the agreement it evidences. Angel keeps the engagement ring.” *Deamon v. Angel*, Appeal Court #2 (1990). **Draw the students’ attention to this before breaking them into groups then have them answer the questions below, read Case #3 and then answer the questions after Case #3, then stop.**

17. In the *Deamon* case, who won the case, Deamon or Angel?

Anything similar to: Angel wins. Angel keeps the ring. Deamon loses. Deamon is not entitled to the ring.

18. In the *Deamon* case, who won the case, the giver of the ring or the receiver of the ring?

The receiver.

19. In the *Deamon* case, the appeal court did its job and answered the legal issue. What is the answer to the *legal* issue given by Appeal Court #2? Hint: If your answer here is the same as the answer above or contains the names “Angel” or “Deamon” or the word “gift” in the law, it is wrong.

If you just cut and paste the answer is: An engagement ring can be recovered by the donor (usually the man is the donor), if the agreement to marry is dissolved by mutual consent or the woman unjustifiably breaks off the engagement, but cannot be recovered by him if he unjustifiably breaks the agreement it evidences.

You can also simplify the law and just say: The engagement ring goes back to the giver if the engagement is broken by mutual consent or the woman is at fault or unjustifiably breaks off the engagement.

20. The *Deamon* case is binding on what courts in the river of case law? Look at the diagram at the beginning of this exercise.

Trial courts below Appeal Court #2 or trial courts # 4,5,6. If you also included Appeal Court #2, I will accept it however a court can change its own precedent, just not precedent set by a higher court.

21. True or false: Both the *Reeves* case and the *Deamon* case look at fault, that is who unjustifiably broke off the engagement.

true

Case #3

Dens and Clo, both residents of the state of Michigan, Orange County, became engaged, and at the time of the proposal, Dens presented Clo with a 1.6 carat diamond in a platinum setting valued at approximately \$19,000. They began making wedding plans and searching for a home. Dens told Clo to ask her parents for \$100,000 for a down payment on their new home because they had the money. Clo asked but her parents said they should buy their own home and would only give them \$2,000 to help with the down payment. After several arguments, Dens broke off the engagement. Dens asked Clo for the ring but she refused. Dens sued Clo in the Orange County court for return of the ring. The trial court said Clo could keep the ring because Dens was at fault for breaking off the engagement. Dens appealed.

22. In Case #3, who is the giver of the ring and who is the receiver?

Dens is giver and Clo is receiver.

23. In Case #3, who broke off the engagement, the giver of the ring or the receiver of the ring?

The giver, Dens

24. In Case #3, who is at fault for breaking off the engagement, the giver of the ring or the receiver of the ring?

The giver of the ring, Dens.

25. REVIEW CONCEPT: You should have realized by now that all of the cases in this River of Case Law exercise raise the same legal issue and that we are looking at how this law developed over time via all of these cases. What is that legal issue raised in this case and also Case #1 and Case #2? Do not include the word “gift” in your answers, not because it is not correct but because it is very difficult to word the issue correctly from that standpoint.

What does the law say happens to an engagement ring when the engagement is broken?

26. Is this a federal or state law issue and how do you know?

State because only state laws are used.

Students stop here

Instructor: Stop here and review the answers with the students. Then review the laws below and break the students back into their groups to answer the questions HOWEVER DRAW THEIR ATTENTION TO THE FACT THAT THE FINAL QUESTIONS ARE A QUIZ THAT WILL BE GRADED AND TURNED IN.

River of Case law: Case 4

LAW (or RULE):

“Engagement rings and other gifts given in contemplation of marriage or engagement are not consideration in support of a contract to marry. No cause of action for breach of a contract to marry is recognized in this state.” MICHIGAN STATUTE #16.009.

Title to a gift, that is ownership of a gift, transfers to the receiver of the gift immediately upon transfer of the gift from the giver to the receiver. *Smyth v. Jonnes*, 123 Michigan 456 (1880). (Very simplified statement of the common law of gifts).

“If the woman breaks off the engagement, she must return the ring. Engagement rings are a different type of gift and not covered by Michigan Statute #345. Ring belongs to Reeves. Trial court’s decision upheld.” *Reeves v. Mandy*, Appeal Court #1 (1980).

“An engagement ring can be recovered by the donor (usually the man is the donor), if the agreement to marry is dissolved by mutual consent or the woman unjustifiably breaks off the engagement, but cannot be recovered by him if he unjustifiably breaks the agreement it evidences. Angel keeps the engagement ring.” *Deamon v. Angel*, Appeal Court #2 (1990).

(1) “Upon termination of an engagement, gifts in contemplation of marriage, such as engagement rings, are to be returned to the donor/giver. (2) The law does not look at the fault of either party. (3) Since the major purpose of the engagement period is to allow a couple time to test the permanency of their feelings, it would seem highly ironic to penalize the donor/giver for taking steps to prevent a possibly unhappy marriage. Trial court’s decision overturned.” *Dens v. Clo*, Appeal Court #3 (2000).

Questions:

27. Who won the case at the trial court level in *Dens* and who won at the appeal court level? Indicate whether this was the giver or the receiver of the ring.

Trial court level: Clo the receiver. Appeal: Dens the giver

28. The law made by the *Dens* court is very different than the law made by the other two courts. What is the difference?

Dens says it does not matter who is at fault for breaking the engagement.

29. The *Dens* case is binding on what courts in the river of law? Look at the diagram at the beginning of this exercise.

Trial courts below Appeal Court #3 or trial courts # 7,8,9. If you also included Appeal Court #3, I will accept it however a court can change its own precedent, just not precedent set by a higher court.

30. What is likely to happen next in the development of this law about engagement rings?

State Supreme Court will take a case. I will also accept this but 50 state courts systems have decided this issue and not one single state legislature has: The state legislature will make a statute.

31. None of these cases has asked the following issue because the court cannot resolve this issue because it is clear what the law says: Do the parties have a contract because of the engagement ring? What is *preventing* everyone from claiming this matter involves a contract?

The Michigan statute #16.009. Also acceptable: The state statute. Anything similar.

Case #4: Diamond (female) and Ditz (male) both residents of the state of Michigan, County of Orange, became engaged and at the time of the proposal, Ditz presented Diamond with a 4 carat diamond in an 18 karat gold setting valued at approximately \$24,000. They began making wedding plans but shortly thereafter Ditz decided to go to Hollywood, Ca and become an actor. While Diamond was taking a shower Ditz took the ring, which was sitting in a ring holder on the sink and left Diamond a note saying, "It's all over between us. It was fun but I want to be a big movie star!" He then returned the ring to the jewelry store for cash and went to Hollywood. After a few months Ditz gave up his dream of being a movie star and moved back to Michigan. Diamond sued him in the Orange County, Michigan trial court for the value of the ring. The trial court ordered Ditz (the giver of the ring) to pay Diamond (the receiver of the ring) \$24,000, the value of the ring. Appeal Court #3 upheld the trial court's decision. Ditz further appealed to the Michigan Supreme Court and the **Michigan Supreme Court's decision is below.**

THE LAW IN THE STATE OF MICHIGAN REGARDING ENGAGEMENT RINGS NOW CONSISTS OF THE FOLLOWING. NOTICE SOME LAWS ARE NO LONGER VALID:

LAW (or RULE):

"Engagement rings and other gifts given in contemplation of marriage or engagement are not consideration in support of a contract to marry. No cause of action for breach of a contract to marry is recognized in this state." MICHIGAN STATUTE #16.009.

Title to a gift, that is ownership of a gift, transfers to the receiver of the gift immediately upon transfer of the gift from the giver to the receiver. *Smyth v. Jonnes*, 123 Michigan 456 (1880). (Very simplified statement of the common law of gifts).

~~"If the woman breaks off the engagement, she must return the ring. Engagement rings are a different type of gift and not covered by Michigan Statute #345. Ring belongs to Reeves. Trial court's decision upheld." *Reeves v. Mandy*, Appeal Court #3 (1980).~~

~~"An engagement ring can be recovered by the donor (usually the man is the donor), if the agreement to marry is dissolved by mutual consent or the woman unjustifiably breaks off the engagement, but cannot be recovered by him if he unjustifiably breaks the agreement it evidences. Angel keeps the engagement ring." *Deamon v. Angel*, Appeal Court #2 (1990).~~

"Upon termination of an engagement, gifts in contemplation of marriage, such as engagement rings, are to be returned to the donor/giver (1). The law does not look at the fault of either party (2). Since the major purpose of the engagement period is to allow a couple time to test the permanency of their feelings, it would seem highly ironic to penalize the donor/giver for taking steps to prevent a possibly unhappy marriage (3). Trial court's decision upheld." *Dens v. Clo*, Appeal Court #3 (2000).

"We agree with the reasoning in *Dens v. Clo* from Appeal Court #3 and reject the reasoning of other cases on this issue. Upon termination of an engagement, gifts in contemplation of marriage, such as engagement rings, are to be returned to the donor/giver (1). Engagement rings are not like other gifts and title to the engagement ring does not pass to the receiver until the parties marry. However, if the parties do not marry, but the engagement is broken, the law does not look at the fault of either party for breaking the engagement and the ring goes back to the giver (2). Since the major purpose of the engagement period is to allow a couple time to test the permanency of their feelings, it would seem highly ironic to penalize the donor/giver for taking steps to prevent a possibly unhappy marriage (3). Trial court and appeal court's

decisions overturned.” *Ditz v. Diamond*, Michigan Supreme Court (2010).

(Quiz starts on next page. Some questions relate to the assigned reading and are about the concepts this exercise assumes you are familiar with.)

LAST NAME, FIRST INITIAL IN LARGE PRINT: _____

Number correct, **including extra credit**. Each question or subpart of a question is 1 point unless specifically labeled otherwise. 2 points off if I find one marked right that is wrong: _____

River of Law Final Questions - QUIZ

1. In Case #4, must Ditz (the giver of the ring) pay Diamond (the receiver of the ring) the \$24,000? *Grammar sidebar*: Notice this question properly used parentheses. Many students incorrectly use parenthesis when they should be using commas. Parentheses are used when the phrase in the parentheses (the man who took the ring) further explains or clarifies the word/phrase prior to the parenthesis example (Ditz). **No**

2. What is the *legal* issue raised in all of these cases? *Hint*: Each of these cases raises the same legal issue.

What does the law say about who is entitled to an engagement ring if the engagement is broken? Anything similar is fine.

3. What is the answer given by the Michigan State Supreme Court to the *legal* issue raised in all of these cases? If your answer anything other than the question asked, it is wrong, that is your answer must be a law.

An engagement ring goes back to the giver when the engagement is broken off for any reason. Anything similar is acceptable.

4. What is the law made by the Michigan State Supreme Court about engagement rings when the engagement is broken? *Hint*. If your answer to this question is **NOT** the same as the answer to the question above, one or both of them are wrong. In other words, these two questions ask exactly the same thing.

An engagement ring goes back to the giver when the engagement is broken off for any reason. Anything similar is acceptable.

5. From the above list of laws, you should be able to see that some laws/cases no longer exist or are no longer valid. Which “law(s)” or “rule(s)” or “case(s)” are no longer valid? You need only put the name of the law or case, not the entire law or case.

Reeves case and the Deamon case

6. Michigan Statute #16.009 in the above list of laws, is binding on what courts in the river of case law?

All of them

7. The *Ditz* case is binding on what courts in the river of case law? Look at the diagram.

All of them

8. EXTRA CREDIT. The *Reeves* and *Deamon* cases are said to have been _____ by the Michigan Supreme Court’s decision. I will not accept the word “invalid” or any derivation of that word because I just told you the cases were no longer valid and using the question to answer the question is circular reasoning, which is a fallacy of logical thinking.

Overtured or overruled, either is fine

9. True or false: The *Ditz* case could be appealed to the US Supreme Court and the US Supreme Court

could overturn the Michigan State Supreme Court.

false

10. Explain your answer above.

This is a matter of state law only

11. EXTRA CREDIT. True or false: This line of cases raises a constitutional law issue.

False

12. Suppose a member of the Michigan state legislature does not like the decision of the Michigan State Supreme Court in the *Ditz* case. This member of the state legislature introduces a bill to add the following to section MICHIGAN STATUTE #16.009: (a) "Title to an engagement rings passes to the receiver of the ring immediately upon receipt of the ring by the receiver and if the engagement is broken off, the receiver is entitled to keep the ring." Can the legislature pass this law even though it conflicts with the decision in the *Ditz* case?

Yes

13. EXTRA CREDIT. Related to prior question: Why or why not in support of your answer?

NOT ACCEPTABLE: The legislature has the power to make laws. (This answer suffers from the fallacy of circular reasoning).

ACCEPTABLE: The Michigan state legislature can pass any law it wants as long as it does not violate a constitution, state or federal and this is not a constitutional law issue. Also acceptable: Statutes are above case law in the hierarchy of law.

14. Assume that Montana has a similar series of cases involving engagement rings in its court system. Must it follow the Michigan cases?

No. Montana is one of two states (I forget the other) which holds that receiver of the ring keeps it even if the engagement is broken off because title transferred immediately upon the giving of the ring.

